matters is that clearly the appellants were permitted in law to adduce evidence to prove the existence of such a promise. And in the event of a finding that there was such an oral undertaking that emanated from the respondent, the appellants, having entered into the agreement on the strength of such a promise, were entitled to rely on that promise. (See *City and Westminster Properties (1934) Ltd.* v. *Mudd*[2]).

It is our judgment therefore that there were issues which must be resolved at the trial. These issues are either of law or fact or both and certainly are not matters which can be decided on affidavit evidence.

In consideration, we see no justification for the learned Judge to hold that no triable issue had been raised. Accordingly, this appeal is allowed with costs.

The order made by the learned Judge in terms of the application should be set aside and substituted therefor an order dismissing the application.

Order accordingly.

Solicitors: *Thevin Chandran Siva & Chong; Gill & Tang.*

PEMBANGUNAN MAHA MURNI SDN. BHD. v. JURURUS LADANG SDN. BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C.JJ.) September 17 & December 28, 1985]

[Kuala Lumpur – Supreme Court Civil Suit No 121 of 1985]

Contract – Sale of land – Commission for professional services as broker – Custom – Judicial notice – Interest on amount awarded.

Evidence – Judicial notice – Custom – Evidence Act 1950, ss. 57 & 58.

In this case the respondent claimed the sum of $960,000 from the appellant as the brokerage fee or commission of 3% of the total purchase price of real property in Pahang. The learned trial judge concluded that there was an implied contract to pay the respondent the commission or brokerage as a broker for their involvement in the successful purchase of the land by the appellant. The question arose whether it is customary that such commission was payable at 2% of the purchase price. Respondent's counsel appeared to have conceded that "3% is not in accordance with the customary payment." The learned judge therefore awarded commission at the rate of 2%. The appellant appealed and the respondent cross-appealed on the quantum and on the omission to award interest.

Held: (1) the learned judge was correct in deciding on the question of fact that there was an implied contract to pay the respondent or brokerage as a broker;

(2) in view of the concession by respondent's counsel, the learned Judge was correct in awarding commission at 2% but it is clear that he had inadvertently omitted to award interest on the sum. The cross-appeal should therefore be allowed, in part.

Cases referred to:

(1) *Raja Rama Rao* v. *Raja of Pittapur* 45 I.A. 148, 154-155.
(2) *Tong Lee Hua* v. *Yong Kah Chin* [1979] 1 M.L.J. 233.
(3) *Tong Lee Hua* v. *Yong Kah Chin* [1981] 2 M.L.J. 1, P.C.
(4) *Bow's Emporium Ltd.* v. *A.R. Brett* [1928] 44 T.L.R. 194.
(5) *Chew Teng Cheong & Anor* v. *Pang Choon Kong* [1981] 1 M.L.J. 298.
(6) *Tang Chiok Sing* v. *Lian Fatt Saw Mill Co* [1976] 2 M.L.J. 241.

SUPREME COURT.

Robert Lazar for the appellant.

J.J. Puthucheary (L.R. Ratnam with him) for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): In the Commercial Division of the High Court, Kuala Lumpur, the respondent/plaintiff claimed the sum of $960,000 from the appellant/defendant as the brokerage fee or commission of 3% of the total purchase price of real property known as Block 8 Keratong in the State of Pahang (Block 8) which the appellant purchased from the registered owner as a result of the alleged professional services of the respondent as broker. The trial Judge gave judgment for the respondent not for the full amount claimed but for the sum of $460,000 calculated at 2% of the total purchase price. The appellant being dissatisfied with the said decision, has now appealed. There is also a cross-appeal by the respondent for the inclusion of the award of interest at 8% per annum with effect from March 19, 1981 till the date of judgment which the learned Judge has omitted to award.

Originally the appellant filed six grounds of appeal, but later abandoned the first three grounds

leaving Grounds 4, 5 and 6 for argument.

The relevant facts as accepted by the learned Judge were that sometime in 1976 Yayasan Islam, Melaka (Yayasan), wanted to purchase landed property. The Chairman of the Yayasan was the then Chief Minister of Melaka (D.W.1). According to the respondent's General Manager (P.W.1), he was contacted by D.W.1 to observe the condition of an estate known as Tar Ga as Yayasan intended to buy it on a joint venture with Dunlop Company and others. P.W.1 accordingly visited Tar Ga with an official from Dunlop. They also visited a neighbouring estate, Block 8, and on their return P.W.1 informed D.W.1 that Block 8 which was for sale was more suitable than Tar Ga from the point of view of purchase. D.W.1 then requested him to find out the owner and further details regarding Block 8. P.W.1 took about one year to trace and approach the owner's representative in the person of David Tan, the Assistant Manager of United Malayan Banking Corporation. P.W.1 arranged a meeting to introduce Dunlop's representative to UMBC and thereafter negotiations were held by the two parties. P.W.1's involvement ended at that stage.

According to D.W.1, as Chairman of Yayasan, he had a team which advised him before a decision was made to buy Block 8 for Yayasan. On financial matters, he contacted Datuk Salleh, the General Manager of Malaysian International Merchant Banking and in terms of management, Dunlop had agreed to help Yayasan. The team met to consider matters and finally Block 8 was purchased for $23 million. The respondent, however, had not been paid their broker's commission as claimed. D.W.1, on the other hand, was of the opinion that P.W.1 should be paid by Yayasan for the agronomic advice and not for brokerage and a reasonable fee would be between $30,000 to $40,000. The reason for this was because at the material time the appellant was still not in existence and if there was any contractual relationship it was between Yayasan and the respondent. It seemed that the appellant was set up subsequently as a joint venture company by Yayasan, Dunlop, Melaka SEDC and Melaka Islamic Religious Council, holding a total of 9,999,998 shares with a view to combining and developing estates for economic and commercial purposes. Be that as it may, the trial Judge having perused the evidence at the trial came to the following conclusion:

"..... This claim has been brought against Pembangunan Mahamurni Sdn. Bhd. But, and it is clear that this company had not been formed at the time of the sale and the efforts of attending to it. It is therefore clear that this claim is without foundation as how can a person perform an act before he is born. Nevertheless here we see that DWI unequivocally stated that the Defendant had adopted all acts and action that were taken on its behalf earlier by members of the team who bought Block 8 (page 36). In point of law it is clear that such conduct is evidence of ratification (see *McLean* v. *Dunn* 4 Bing 721 page 947 and sections 149, 150 of Contracts Act). And it is also true that DWI was chairman at the relevant time of the Yayasan Islam which was the largest shareholder of the Syarikat Mahamurni. The loudest voice carries the greatest weight when it comes to decision making in a body. And DWI had himself confirmed this to be the position in Syarikat Murni (Page 35)."

The learned Judge also concluded that there was an implied contract to pay the respondent the commission or brokerage as a broker for their involvement in the successful purchase of Block 8 by the appellant. Based on D.W.1's admission of having requested for the professional services of the respondent to obtain details and to submit a report for the purchase of Block 8 and that such work was to be paid for and considering the efforts made by the respondent of having to find the owner or representative of Block 8 for the purpose of negotiation with the appellant, which subsequently took place, the learned Judge rightly concluded that the respondent was entitled to their commission as brokers. These are purely questions of fact made by the learned Judge. They relate to the three grounds of appeal which as stated earlier were abandoned by the appellants. Ground 6 was not seriously relied on. In the circumstances, as the case stands, the remaining grounds in particular the issue whether judicial notice should be taken by the Court that there exists in this country a custom that a real estate agent is entitled to a commission of the purchase price, become rather academic However, in view of the ground that follows, *i.e.* whether it is customary that such commission was payable at 2% of the purchase price, we feel it is worthwhile for us to deal with the two grounds, we treat it as one issue.

Now, the general rule is that all facts in issue and relevant facts must be proved by evidence. There are, however, two classes of facts which need not be proved, *viz.* (a) facts judicially noticed and (b) facts admitted. The exceptions are dealt with by sections 56, 57 and 58 of the Evidence Act 1950 under the title "Facts which need not be proved." In so far as judicial notice is concerned, the provisions of section 57 subsection (1) makes it mandatory for the Court to take judicial notice of all laws and regulations having the force of law,

public Acts passed by Parliament, the course of parliamentary proceedings and other matters that are enumerated in subsection (1) (a) to (o) of the section. The list however is not exhaustive since it is impossible to make a really complete list although a long list of facts which the English courts take judicial notice has been prepared. The important point to note is that section 57 does not prohibit the courts from taking judicial notice of other facts not mentioned therein. The matter which the Court will take judicial notice must be the subject of common and general knowledge and its existence or operation is accepted by the public without qualification or contention. The test is that the facts involved must be so sufficiently notorious that it becomes proper to assume its existence without proof. The opponent, however, is not prevented from disputing the matter by adducing evidence if he disputes it. (See *Sarkar* on Evidence, 13th Edn. paras. 606-609). Judicial knowledge is continually extended to keep pace with the advance of art, science and general knowledge. Subsections (2) and (3) of section 57 provide discretionary power to the Court to resort to the aid of appropriate books or documents of reference in all matters of public history, literature, science or art.

With regard to custom and usage, they are required to be proved in any one of these four ways, *i.e.*, by direct evidence of witnesses which must be positive and not amount to a mere opinion or by a series of particular instances in which it has been acted upon or by proof of similar customs in the same or analogous trades in other localities or when ancient by *e.g.* the declaration of deceased persons of competent knowledge or other forms of reputation. (See *Phipson* on Evidence, 13th Edition p. 129).

Judicial notice, however, will be given to any custom or usage which has repeatedly been recognised by the courts and it passes into the law of the land; in other words, if it has been frequently or at all events more than once, proved in the superior court as shown by reported cases. The Court may hold the custom or usage to be introduced into the law without the necessity of proof in each individual case (*Raja Rama Rao* v. *Raja of Pittapur*[1]). The opposite party against whom such evidence is tendered may show that the custom or usage does not exist or has not been acted on in particular instances or was a mere practice or has been superseded by a later usage, *etc.*

Turning back to the present appeal, except for the Federal Court case of *Tong Lee Hua* v. *Yong Kah Chin*[2] which was upheld on appeal by the Privy Council,[3] we do not think that it has been repeatedly recognised by the courts in this country, superior or otherwise that there exists a custom that a real estate agent is entitled to a commission of the purchase price and that the commission is at 2% thereof. There may, however, be a common practice that estate agents are paid commissions either by the vendor or by the purchaser or sometimes by both. That is a rule which yields to circumstances and depends on negotiations between the parties (See *Bow's Emporium Ltd.* v. *A.R. Brett*[4]). In our considered judgment it has not developed into a recognised custom or usage as to entitle it to be judicially noticed. Whether an agent or broker is entitled to any commission depends on the agreement between the parties and has to be proved by positive evidence. *Chew Teng Cheong & Anor.* v. *Pang Choon Kong*[5] and *Tang Chiok Sing* v. *Lian Fatt Saw Mill Co.*,[6] both decided by the Federal Court are two good examples.

On the other hand, the only authority brought to our attention was *Tong Lee Hua* v. *Yong Kah Chin (supra)* which deals with an undertaking to pay brokerage in the event of the appellant successfully obtaining the property in question at 6½% of the sale price. The Federal Court in accepting the said percentage as being payable by way of an expressed agreement stated its view that "the commission of 6½% of the purchase price is considerably more than the customary purchaser's commission of, as we understand it, 2%." On appeal to the Privy Council, the same was quoted by their Lordships in considering whether there was a triable issue as to the validity or otherwise of the sub-option upon which the undertaking was based. No issue of judicial notice was raised and discussed in both courts. The Federal Court appeared to have made a comparison between the percentage of a vendor's customary commission and a purchaser's commission which the court understood to be at 2%. The Court, however, allowed the commission at 6½% as claimed. As we have pointed out earlier, the mere mentioning of the purchaser's commission as being customary does not by itself render it to be judicially noticed without it being repeatedly recognised by the superior courts.

In the present appeal, the learned Judge allowed the brokerage of 2% to be paid to the respondent instead of 3% as prayed for in the statement of claim, on the request of the respondent's coun-

sel. The latter appeared to have conceded "that 3% is not in accordance with the customary payment." Had it not been for the counsel's request, we are quite certain that the learned Judge would have awarded 3%, having decided on the evidence in favour of the respondent. The respondent's counsel is of course entitled to ask for a lesser amount than that to which his client is entitled having regard to the relationship between solicitor and client and the privileged communication between them. Based on the principles discussed earlier, we hold that judicial notice cannot be applied in this case. In any event, we do not wish to disturb the Judge's finding for obvious reason. The respondent was satisfied with the award of $460,000 at 2% as commission, which we confirm. The appeal is therefore dismissed with costs. The deposit to be paid to the respondent on account of taxed costs.

With regard to the cross-appeal by the respondent, it is clear that the learned Judge has inadvertently omitted to award interest as prayed at 8% per annum from March 19, 1981, *i.e.*, from the time the respondent became entitled to the said sum till the date of judgment. That was also conceded by the appellant's counsel. We therefore allowed the cross-appeal with costs.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Skrine & Co.*

RAMLI BIN KECHIK v. PUBLIC PROSECUTOR

[S.C. (Abdul Hamid C.J. (Malaya), Mohamed Azmi & Syed Agil Barakbah S.C.JJ.) November 18, 1985 & January 10, 1986]

[Penang – Supreme Court Criminal Appeal No. 40 of 1984]

Criminal Law and Procedure – Trafficking in raw opium – Application to send exhibits to the Chemistry Department for further examination and the calling of fresh evidence on said exhibits – Definition of "raw opium" – Chemist's evidence on species origin of exhibits – Dangerous Drugs Act, 1952, ss. 2 & 39B – Evidence Act, 1950, s. 114(e) – Criminal Procedure Code (F.M.S. Cap. 6), s. 425.

Dangerous Drugs – Trafficking in raw opium – Definition of "raw opium" – Fresh evidence of chemist – Dangerous Drugs Act, 1952, ss. 2 & 39B.

Evidence – Fresh evidence on exhibits – Admission of relevant evidence even if illegally obtained.

In this case the appellant was convicted in the High Court for trafficking in 15,603 grammes of raw opium in contravention of section 39B(1) (a) of the Dangerous Drugs Act, 1952 and sentenced to death. He appealed against both conviction and sentence. The only point raised on the appeal was whether the trial judge had erred in law in entertaining the application of the prosecution under section 425 of the Criminal Procedure Code during the course of the prosecution case. During the trial, after three prosecution witnesses had given evidence it dawned upon the prosecution that it was necessary for them to prove that the opium found in the possession of the appellant had been extracted from the plant species Papaver somiferum L. in order to constitute "raw opium" within the definition of section 2 of the Dangerous Drugs Act, 1952. The trial judge allowed the said exhibits to be sent to the Chemistry Department to determine its species origin and on resumption of hearing he allowed such evidence to be adduced by the prosecution.

Held, dismissing the appeal: (1) by its very nature the discretion to be exercised under section 425 Criminal Procedure Code depends on the facts of each case – the main consideration being the essentiality of the additional evidence to a just decision of the case. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the court would be justified in exercising its discretion in calling for additional evidence under this section;

(2) when the court makes an order for court exhibits to be handed over to the police or any other officer for a certain purpose, it may be presumed under section 114(e) of the Evidence Act that such judicial and official acts have been regularly performed. The unbroken chain of evidence may therefore be presumed unless the contrary is shown;

(3) in the context of section 425 Criminal Procedure Code and independently of the court's inherent power over court exhibits, a trial court has power to order examination of any such exhibits by expert witnesses at any stage of the trial or proceeding, if such examination is necessary for the procurement of the essential evidence to enable the court to get at the truth and to arrive at a just decision. In addition, the court also has inherent power to examine court exhibits in or away from the court room either by itself or by witnesses for purpose of identification. It is immaterial that such examination may amount to an investigation provided it is done for the limited purpose of determining the truth of a material and essential matter in issue. Whether such inherent power over court exhibits has been exercised judicially must depend on the facts of each particular case;

(4) in this appeal, the fresh evidence of a chemist as to whether the opium had come from the species Papaver somniferum L. [PSL] or from Papaver setigerum D.C. [PSDC] was undeniably essential for a fair trial and a just decision of the case, and the learned judge had acted judicially in allowing the application under section 425 during the course of the prosecution case. The evidence of the second chemist [Mr. Tham] was not in fact obtained illegally; nor was it obtained by improper or unfair means. The relevancy of Mr. Tham's evidence not being in dispute, it was accordingly admissible in law and properly admitted by the trial judge;

(5) when exercising its appellate jurisdiction in criminal cases, before the Supreme Court will interfere it must be